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No. 91-1562

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.
Petitioner,

v.

KELLY MERK, et al.,
Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Respondents.

Petition For Writ of Certiorari
To the United States Court of Appeals
For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner replies herein to the two briefs filed by the Individual Respondents and the Union Respondents. Unless otherwise indicated, references to "Respondents" will mean "Individual Respondents."

1. It is necessary to correct some of the factual misstatements and unwarranted assumptions in the Respondents'

Brief.[1] Respondents state (p. 1) that the January 27, 1983 agreement "was reduced to writing." What the jury found (and the Seventh Circuit agreed in *Merk II* (Pet. App. at B-7)), was that "the parties did not intend the written terms of the CBA to embody their entire agreement." Thus, rather than seeking to enforce "the agreement" actually reached by Jewel and Local 881, Respondents seek to impose on Jewel a substantially different one.

2. Respondents state (p. 1) that only Jewel's then-current employees "were included in the settlement". In fact, the settlement covered all current and former employees but provided that only current employees should get backpay. Stip. Uncon. Facts, ¶¶ 51, 52.

3. Respondents seek to obscure the outcome of prior proceedings by persistently referring to the oral reopener as a "purported" agreement. (p. 2). Such references ignore that the jury found that Local 881 had orally agreed to a contingent reopener – a factual finding not disturbed on appeal. The Seventh Circuit acknowledged in *Merk II* that "it was proper for the jury to resolve the additional factual question of the precise terms of the oral promise." (Pet. App. at B-7).

4. Respondents are disingenuous in asserting (p. 2) that the Jewel negotiators' notes are the only contemporaneous written references to the reopener. The record includes Local 881 negotiators' notes that became fragmentary or broke off precisely at the point where that Company's notes indicate that the reopener was discussed. (*See* Pet. App. at D-3) Furthermore, the record includes the following documentary evidence contemporaneous with the subsequently reopened negotiations: a) Jewel's letter of December 14, 1983 (notifying Local 881 of Jewel's desire to negotiate "pursuant to our re-opener agreement") [Def. Exh. 32]; b) sign-in sheets from negotiating sessions clearly headlined "Neg. L. 881 — Econ. Reopener" [Def. Exh. 9-11]; and c) a report

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[1] Respondents erroneously urge that this Petition addresses an interlocutory question and also raises a jurisdictional issue. The underlying decision determining liability here is a final order ripe for review. *See, e.g., Airline Pilots v. O'Neill*, 449 U.S. ___, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991); Stern, Gressman, Shapirio, *Supreme Court Practice*, 41, 123-124 (6th Ed. 1986).

from UFCW International official Peter Voeller reporting that he had conferred with the Local 881 officers and that "[a]pparently, an 'agreement' for a reopener was reached, although not reduced to writing, during the last contract negotiations between Jewel and Local 881." (Pet. App. at D-11)

5. There is no basis in the record for Respondents' assertion (p. 2) that when Jewel contacted Local 881 in December 1983 about an economic reopener, "[t]he Union thought the meetings related to Jewel's request for a mid-term contract concession" rather than Jewel's exercise of a power to reopen the contract. Jewel's December 14 letter and the Voeller report make it clear that the Union thought no such thing.

6. Respondents contend (p. 5) that Petitioner has not argued that *Merk II* has significant nationwide precedential value. This is a puzzling assertion, which ignores the following arguments made by Petitioner: (a) *Merk II* "perverts 'national labor policy'" and "significantly increases the risks of instability and bargaining impasses leading to strikes" (Petition at 5); (b) *Merk II* threatens the interests of unions, employers and employees by inviting judicial interference with the collective bargaining process and effectively requiring employer and judicial policing of the details of union ratification procedures (Petition at 9); and (c) *Merk II* threatens "the flexibility and problem-solving capacity of collective bargaining" by creating uncertainties as to ultimate enforceability of various good faith oral and written side agreements (*i.e.*, enforceability may depend upon whether a court subsequently feels that the subject matter of the agreement was "fundamental") (Petition at 14).

7. Contrary to Respondent's bland assurances of *Merk II*'s limited precedential effect, the approach in *Merk II* would work substantial mischief in frequent and nationwide situations. It would put at risk any and all provisions of a bargain not explicitly disclosed to members during ratification. Furthermore, even if a provision is disclosed to members before the contract is ratified, the *Merk II* rationale would presumably permit a ratified deal to be undone if a dissident individual or group could later convince a court that such disclosure had been misleading or incomplete. And, as in *Merk II*, the court which engages in this "Monday

morning quarterbacking" may do so years after the pertinent negotiations and ratification.

8. Respondents attack a straw man, urging (p. 10) that *Ackley v. Western Conference of Teamsters*, Nos. 90-55438, 90-55702 (9th Cir. February 21, 1992) (which they concede realistically describes the information gap between union negotiators and members) does not hold that there is a federal labor policy "favoring clandestine agreements." Federal law does not *favor* such agreements, but neither does it nullify them. Indeed, federal law does not mandate any ratification or disclosure requirements at all. Typically, ratification vel non depends on the provisions of a union's constitution. Furthermore, federal labor policy contemplates pragmatic and effective collective bargaining. "Real world" negotiations often require supplemental agreements – oral or written – in order to reach settlements and avoid strikes. Federal labor policy permits such flexibility and insulates good faith collective bargains from attacks based upon claims of defects in the union ratification process.[2]

9. Respondents' assertion (p. 10) that *Ackley* is not in conflict with *Merk II* completely ignores two important aspects of the approach taken by the court in *Ackley*. First, it presented a comprehensive framework for dealing with union breaches of its ratification obligation under union constitutions. (Pet. App. at 0-25) Second, *Ackley* focused not on contract nullification but on an action against the union under Section 301 of the Labor Management Relations Act ("LMRA") as the primary remedy for such breaches. (Pet. App. at 0-25)

10. *Ackley* aside, Respondents, although denying any inter-circuit conflict (p. 13), do not even address the cases referred to on pp. 15-16 of Petitioner's Brief, showing the existence of such a conflict.

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[2] Respondents (p. 10) accuse Jewel of having "the temerity to mislead this Court" by relying on *Ackley*. Petitioner strongly objects to that scandalous accusation. The petition on p. 14-15 sets forth the differences between the two cases. Instead of attempting to convince this Court by reasoned argument that these differences rob *Ackley* of persuasive force in the case at bar, Respondents resort to an unsubstantiated and unwarranted charge.

11. Respondents quarrel (p. 7) with Judge Easterbrook's assertion that *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945) has "vanished without a trace" as authority for the proposition that federal labor law is hostile to unwritten agreements. Respondents rely on a few district court and state court cases and, principally, on the NLRB's decision in *NDK Corp.*, 278 N.L.R.B. 1035 (1986). In *NDK*, the Board accepted the Administrative Law Judge's statement that national labor policy requires that evidence of oral agreements be unavailing to vary the terms of a written collective bargaining agreement. The Board based its ruling "solely on the rationale of *Gatliff Coal*." *Id.* at 1035.

But what was the "rationale of *Gatliff Coal*" and is it valid today? There the Sixth Circuit adopted a Kentucky district court opinion, declaring that the National Labor Relations Act ("NLRA") "contemplates that a collective bargaining agreement be in writing," so that the Act "clearly precludes . . . reliance upon the prior or contemporaneous oral agreement. . . ." 152 F.2d at 56. *Gatliff* was, however, decided long before Section 301 of the LMRA authorized the federal courts to fashion a body of substantive law for the enforcement of collective bargaining agreements. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957). The later evolution of federal common law has relegated "the rationale of *Gatliff Coal*" to the dustbin of history. In 1952, the Sixth Circuit itself rejected *Gatliff's* premise regarding oral agreements. In *Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union of North America*, 193 F.2d 209 (6th Cir. 1952), that court declared:

> We do not agree with appellees' contention that the [NLRA] requires the collective bargaining agreement to be reduced to writing and signed in order to be valid. The Act does not so state. In *H.J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514, 61 S.Ct. 320, 85 L.Ed. 309 and *Cox v. Gatliff Coal Co.*, D.C., 59 F.Supp. 882, affirmed 6th Cir., 152 F.2d 52, it was stated that the Act contemplated that a collective bargaining agreement be in writing. Since those decisions, the Act has been amended by the [LMRA] of 1947, by which collective bargaining was defined as including "the execution

> of a written contract incorporating any agreement reached if requested by either party". Section 158(d), Title 29 U.S.C.A. In our opinion, this contemplates valid oral agreements where neither party requests a written instrument.

193 F.2d at 214.

Furthermore, in *Merk II*, even the Seventh Circuit in effect rejected the basic premise of *Gatliff*, declaring (Pet. App. at B-7) that the oral reopener became an enforceable part of the collective bargaining agreement. That declaration is correct but its incompatibility with *Gatliff's* premise is a source of further confusion warranting review by this Court.

12. With respect to the duty of fair representation, the briefs in opposition rely on two assertions: a) at the time of the settlement, the Union owed no duty of fair representation to the individual Respondents because they were no longer employees of Jewel; and b) the individual Respondents did not "assent" to the Union's representation of them in the settlement negotiations with Jewel.

13. Contrary to both briefs in opposition, neither *Allied Chemical v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), nor *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985) *cert denied*, 471 U.S. 1102 (1985) supports the conclusion that the Union's duty of fair representation ended when a grievant's employment with Jewel ended. *Pittsburgh Plate* presented the question of whether an employer could increase retirees' benefits prospectively without first bargaining with the union. Here, the issue is whether a union may bind former employees by its settlement of a grievance that arose *during their employment*, that is based on the provisions of a collective bargaining agreement and that is covered by the agreement's grievance arbitration processes.

14. Both briefs in opposition ignore the basic purposes of this Court's decisions in *Pennsylvania Railroad v. Day*, 360 U.S. 548 (1959) and *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965); that is, to channel the grievances of former employees into applicable grievance arbitration procedures and to avoid the

conflicting results, expense and destablization that parallel or alternative procedures could generate. Furthermore, *Maddox* not only upheld the exclusivity of the grievance arbitration process with respect to former employees but made it clear that the duty of fair representation was a corollary of the union's authority as exclusive bargaining representative. *See Maddox*, 379 U.S. at 653 and 657. As this Court recently emphasized in *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 87 (1989) (which involved a hiring hall), "[t]he key [to the duty of fair representation] is that the union is administering a provision of the contract...."

15. *Alpha Portland* clearly is distinguishable from this case. *Alpha Portland* involved retirees, who held a unique place in the collective bargaining process and who were covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, *et seq.*[3] Here, former employees are complaining about the settlement of a grievance which was filed on their behalf by their union. Former employees frequently make claims arising from their former employment which are covered by a collective bargaining agreement. Accordingly, it would be desirable for this Court to grant this Petition and to resolve the tensions that exist among *Alpha Portland, Day,* and *Maddox*.

16. The Respondents suggest (p. 24) that review is not necessary because these tensions can be resolved by holding that distinct groups with conflicting interests are not subject to a union's exclusive authority or to the grievance arbitration process. Such an approach ignores that the duty of fair representation contemplates the existence of conflicts of interest among members of a bargaining unit and that the duty requires the union to deal fairly with such conflicts. Indeed, the sharper the conflict, the more manifest is the need for the duty. The Respondents' approach would permit any distinct minority to bypass the grievance arbitration process and would deny them the protection of the duty of fair representation as well. The Respondents' argument does not implicate only a narrow fact situation but

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[3] ERISA declares a policy of providing participants with "ready access to federal courts." See *Alpha* 752 F.2d at 1300. This policy sharply contrasts with the preference for the parties' dispute-settling mechanisms embodied in §203(d) of the LMRA, 29 U.S.C. § 173(d).

strikes at the fundamentals of national labor policy fashioned by this Court.

17. Respondent Union urges that Jewel "waived" the contention that the individual Respondents assented to the Union's representation by their failure to disavow the Union's processing of the grievance on their behalf. (P. 7) Jewel asserts that no such waiver occurred.[4]

18. Respondent Union erroneously asserts that *Koshatka v. Philadelphia Newspapers, Inc.* 762 F.2d 329 (3d Cir. 1985) is distinguishable from this case because the grievant therein voluntarily filed a grievance. The individual Respondents did so here as well, through their exclusive representative (Pet. App. at L-1). More importantly, the duty of fair representation does not hinge on the voluntary filing of a grievance. Rather, "[a] union's assumption of the tasks of representation is one of the bases upon which the duty of fair representation can arise." *Koshatka* at 335.

19. Respondent Union misapprehends the applicability of *O'Neill* to this case. Respondent Union cites *O'Neill* (P. 11) for the proposition that the *existence* of a duty of fair representation is determined by the relationship of the parties at the time of the alleged violation of the duty. However, there was no question in *O'Neill* that the duty of fair representation existed; rather, the issue was whether it had been breached, an issue not yet raised in this case.

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[4] Jewel has raised the issue of assent on numerous occasions from the outset of this litigation. *See e.g.* Jewel's Reply Brief in Support of Motion to Dismiss Count I at P5; Jewel's brief before the Seventh Circuit in *Merk I* at pp. 20, 24-27; and Jewel's Petition for Reconsideration in *Merk I* at pp. 8, 10. Petitioner has also argued throughout that the individual Respondents' assent is, of necessity, implied from their employment under the collective bargaining agreement.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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